



STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER POLLUTION CONTROL
401 Church Street
L&C Annex 6th Floor
Nashville, TN 37243-1534

March 24, 2008

Mr. Don W. Duncan
5310 White Blossom Way
Knoxville, Tennessee 37918

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT #7099 3400 0014 0970 4964

Subject: DIRECTOR'S ORDER NO. WPC08-0025
JOSHUA'S LANDING
KNOX COUNTY, TENNESSEE

Dear Mr. Duncan:

Enclosed is a Director's Order and Assessment of Civil Penalty issued by Paul E. Davis, Director of the Division of Water Pollution Control, under the delegation of Commissioner James H. Fyke. Read the Order carefully and pay special attention to the NOTICE OF RIGHTS section.

Corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the State of Tennessee. Non-attorneys may participate in any such proceedings to the extent allowed by law.

If you or your attorney has questions concerning this correspondence, contact Paulette Barton at (615) 532-0683.

Sincerely,

Patrick Parker, Manager
Enforcement and Compliance Section

PNP:BPB

cc: DWPC – EFO-Knoxville
DWPC – Compliance File
OGC

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	
)	
DON W. DUNCAN)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
RESPONDENT)	CASE NO. WPC08-0025

DIRECTOR’S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the “director” and the “division” respectively) by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the “commissioner” and the “department” respectively).

II.

Don W. Duncan (hereinafter the "Respondent") is a resident of the state of Tennessee and is the owner/developer of a residential subdivision described as Joshua’s Landing (hereinafter “the site”) located on Tazewell Pike in Knox County. Service of process may be made on the Respondent at 5310 White Blossom Way, Knoxville, Tennessee 37918.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the “Rule”). Pursuant to T.C.A. §69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined by T.C.A. §69-3-103(20) and, as hereinafter stated, has violated the Act.

V.

The wetland referred to herein is "waters of the state," as defined by T.C.A. §69-3-103(33). Pursuant to T.C.A. §69-3-105(a)(1), all waters of the state have been

classified by the Tennessee Water Quality Control Board for suitable uses. In accordance with Department Rule 1200-4-4, "Use Classifications for Surface Waters," this wetland has been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife. Additionally, this wetland has been determined to be High Quality Waters and a state-listed protected species, *Lilium canadense*, has been identified within a one-mile radius of the site.

VI.

T.C.A. §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI), a site-specific Storm Water Pollution Prevention Plan (SWPPP) and an appropriate fee.

FACTS

VII.

On November 11, 2004, the Respondent submitted a NOI, SWPPP, and appropriate fee to the Knoxville Environmental Field Office (K-EFO) requesting coverage under the TNCGP for construction activities at the site. The Respondent was issued TNCGP coverage on March 11, 2005, and assigned tracking number TNR1301132.

VIII.

On January 15, 2008, division personnel from the K-EFO conducted a complaint investigation at the site. The division noted that EPSC measures at the site were inadequate, had not been maintained, and were not in accordance with the SWPPP. Sediment-laden water had flowed into the street and storm drains that discharged off site. Sediment-laden water had also discharged from an eroded detention basin into a wet weather conveyance, and off site. The basin had not been maintained and had filled with sediment.

While at the site, division personnel documented a deep, narrow excavation that was functioning as an outfall, allowing eroded material and sediment-laden water from an upper basin to discharge into the wetland, resulting in a condition of pollution. This excavation was an unfinished component of a SWPPP equivalency measure originally intended to protect the wetland from storm water discharges from the site.

The equivalency measure was to consist of a large, lined trench that was supposed to exist between active portions of the site and the wetland. Storm water runoff from those areas of the site would enter the trench and be diverted away from the wetland to detention basins for treatment, thus preventing sediment from directly entering the wetland. However, the trench system had not been completed or maintained in areas where it had been installed, and it had not been extended into additional phases as construction activity progressed at the site.

The deep narrow excavation was originally intended to contain a discharge pipe connected to a water quality control box that would prevent sediment from being discharged from a connecting detention basin. The water quality control box and the

discharge pipe were never constructed or installed as shown in the SWPPP. As a result, the excavation was functioning as a direct outfall, discharging untreated storm water into the wetland.

Division personnel noted that a majority of the site had been cleared and graded, and that excavation equipment had been removed from the site. It appeared that the site had been inactive for a significant amount of time, and that neither temporary or permanent stabilization measures had been installed. According to the TNCGP, temporary or permanent soil stabilization at the construction site or a phase of the project must be completed not later than 15 days after the construction activity in that portion of the site has temporarily or permanently ceased.

IX.

On January 25, 2008, division personnel issued a Notice of Violation (NOV) to the Respondent for violations noted in the January 15, 2008, complaint investigation. The Respondent was instructed to install and maintain adequate EPSC measures and to stabilize the site immediately, in accordance with the SWPPP and the permit. The Respondent was further instructed to submit written documentation describing the corrective measures implemented to bring the site into compliance, submit the EPSC inspection reports, and a summary of any modifications to the SWPPP within two weeks of receipt of the NOV.

X.

On February 4, 2008, the division received a written response from the Respondent regarding the January 25, 2008, NOV, stating that EPSC measures had been

- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

T.C.A. §69-3-114(b) states:

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in §69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the commissioner under this part.

XIII.

By discharging sediment into waters of the state that resulted in a condition of pollution, the Respondent has violated T.C.A. §§69-3-114(a), referenced below, and 69-3-114(b), as referenced above:

§69-3-114(a) states, in part:

It is unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in Section 69-3-103 (22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XIV.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following Order and Assessment to the Respondent:

1. The Respondent shall, within 30 days of receipt of this Order and Assessment, establish effective EPSC measures on-site such that sediment is not allowed to leave the site or enter waters of the state.
2. The Respondent shall, within 7 days of establishing effective EPSC measures on-site, submit written documentation and photographic evidence indicating that these measures are in place. The Respondent shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the K-EFO at 3711 Middlebrook Pike, Knoxville, Tennessee 37921.
3. The Respondent shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.
4. The Respondent shall, within six months of receipt of this Order and Assessment, provide documentation of attendance and successful completion of the Department's EPSC Workshop for all employees who manage or oversee construction projects to the K-EFO, at the address shown in item 2, above. Information may be found on the program website at <http://www.tnepsc.org>.
5. The Respondent is hereby assessed a CIVIL PENALTY in the amount of NINETEEN THOUSAND DOLLARS (\$19,000.00) to be paid as follows:
 - a. The Respondent shall pay SIX THOUSAND FIVE HUNDRED DOLLARS (\$6,500.00) to the division within THIRTY (30) DAYS of receipt of this Order.
 - b. The Respondent shall pay THREE THOUSAND ONE HUNDRED TWENTY FIVE DOLLARS (3,125.00) to the division within THIRTY (30) DAYS of

default, if, and only if, the Respondent fails to comply with Item 1 above in a timely manner.

- c. The Respondent shall pay THREE THOUSAND ONE HUNDRED TWENTY FIVE DOLLARS (3,125.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 2 above in a timely manner.
 - d. The Respondent shall pay THREE THOUSAND ONE HUNDRED TWENTY FIVE DOLLARS (3,125.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 3 above in a timely manner.
 - e. The Respondent shall pay THREE THOUSAND ONE HUNDRED TWENTY FIVE DOLLARS (3,125.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 4 above in a timely manner.
6. The Respondent shall pay DAMAGES to the division in the amount of ONE HUNDRED EIGHTY SEVEN DOLLARS AND THIRTY CENTS (\$187.30) payable within THIRTY (30) DAYS of receipt of this Order and Assessment.

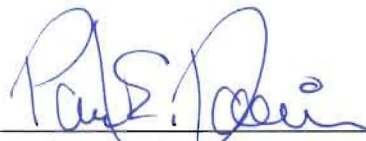
The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this Order. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written

request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing Order is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the Director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 24th day of March, 2008.



Paul E. Davis, P.E.

Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§69-3-109, 115, allows any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The

petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L&C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payments of the civil penalty shall be made payable to the "Treasurer, State of Tennessee," and sent to the Division of Fiscal Services-Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence regarding this

matter should be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, at 6th Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243-1534. Please write your case number on all payments and all correspondence concerning this matter.